(23)

FILED
JAN 2 1946
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM—1945

No. 708

SIDNEY S. GRANT, *Respondent,*

against

THE READER'S DIGEST ASSOCIATION, INC., *Petitioner.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, The Reader's Digest Association, Inc., respectfully prays that a writ of certiorari issue to review the Order of the United States Circuit Court of Appeals for the Second Circuit filed November 2, 1945 (R. 20), which Order reversed a judgment of the United States District Court for the Southern District of New York entered April

NOTE: All references to the record before the Court below, and to the record of the further proceedings in the Court below, are in page numbers.

20, 1945 (R. 13), dismissing a complaint in libel for insufficiency in law on its face.

The opinion of reversal of the Circuit Court of Appeals, not yet officially reported, is at R. 17. The opinion of the District Court is at R. 5.

Summary Statement of the Matters Involved

This case involves a claim of libel by the respondent, a Massachusetts citizen, against the petitioner, a New York corporation, predicated upon the publication in the September, 1944 issue of the petitioner's magazine, "The Reader's Digest", in an article entitled "I Object To My Union In Politics", of the following matter:

> "And another thing. In my state the Political Action Committee has hired as its legislative agent one Sidney S. Grant who but recently was a legislative representative for the Massachusetts Communist Party."

In his complaint, the respondent alleged as an extrinsic fact that he was an attorney (R. 2), and further pleaded, by way of innuendo, that the above quoted words falsely charged that the respondent, an attorney representing labor organizations, had represented the Communist Party of the State of Massachusetts in the official capacity of legislative agent before the General Court of Massachusetts (R. 3). No special damages were alleged in the complaint.

Following the service of the summons and complaint, the petitioner made a motion in the District Court to dismiss the complaint for legal insufficiency, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (R. 4). That motion was granted by the District Court upon the ground that the matter complained of was not libelous or actionable *per se* (R. 7). Although the District Court granted the respondent leave to amend his complaint to

allege special damages, if any (R. 7), no such amendment was made; and the judgment of dismissal was entered on the respondent's default in pleading (R. 13).

The Circuit Court of Appeals, in reversing the judgment of the District Court, considered that a jury might find that the alleged libelous words charged the respondent with having acted as an agent of the Communist Party and with being in general sympathy with its objects and methods, and held that such a charge was actionable *per se* under the law of the State of New York (R. 17).

Opinions Below

The District Court, in granting the petitioner's motion to dismiss, stated that "after a careful examination of the precedents furnished me by both plaintiff and defendant and after an extensive search in the books on my own account, I feel constrained to find that the words complained of are not libelous *per se*", citing the New York cases of *Garriga* v. *Richfield,* 174 Misc. 315; *Luotto* v. *Field,* 49 N. Y. S. (2d) 785, 788 (R. 6); but the Circuit Court of Appeals recognized neither of these two cases as controlling authority. Instead, the Circuit Court of Appeals, after stating (erroneously, as we believe) that the case at bar "turns upon whether it is libellous in New York to write of a lawyer that he has acted as agent of the Communist Party, and is a believer in its aims and methods" (R. 18), indulged for the greater part of its opinion of reversal in an exposition of what it considered to be the underlying philosophy of the law of libel in the State of New York.

Thus, the Circuit Court of Appeals first observed, without any citation of New York authority, that the "interest at stake in all defamation is concededly the reputation of the person assailed; and any moral obliquity of the opinions of those in whose minds the words might lessen that reputation, would normally be relevant only in mitigation of

damages" (R. 18). The Court then proceeded to find that, while the New York decisions "define libel, in accordance with the usual rubric, as consisting of utterances which arouse 'hatred, contempt, scorn, obloquy or shame', and the like", and "the opinions at times seem to make it a condition that to be actionable the words must be such as would so affect 'right-thinking' people" (R. 18-19), an actionable libel may result, regardless of the reaction of "right-thinking" persons, relying principally upon the New York case of *Katapodis* v. *Brooklyn Spectator, Inc.*, 287 N. Y. 17. The Court did not believe, therefore, that it "need say whether 'right-thinking' people would harbor similar feelings toward a lawyer, because he had been an agent for the Communist Party, or was a sympathizer with its aims and means" (R. 19). As the Court stated in its opinion of reversal: "It is enough if there be some, as there certainly are, who would feel so, even though they would be 'wrong-thinking' people if they did" (R. 19).

Only in the last paragraph of its opinion of reversal did the Circuit Court of Appeals make any reference to pertinent New York decisions cited and discussed in the parties' appeal briefs. After noting that, in *Garriga* v. *Richfield*, 174 Misc. 315 (relied upon by the District Court), Mr. Justice Pecora held "that it was not libellous to say that a man was a Communist", and that, in the next year in *Levy* v. *Gelber*, 175 Misc. 746, Mr. Justice Hofstadter "held otherwise", the Court observed that such apparent conflict of authority "perhaps left the answer open" (R. 20). However, the Court regarded the case of *Boudin* v. *Tishman*, 264 App. Div. 842, as "an unescapable ruling, although no opinion was written", and "Being the last decision of the state courts, it is conclusive upon us, unless there is a difference between saying that a man is a Communist and saying that he is an agent for the Party or sympathizes with its objects and methods" (R. 20). The Court then considered that any such difference was "one of degree only" (R. 20), and concluded its opinion of re-

versal with the observation that "those who would take it ill of a lawyer that he was a member of the Party, might no doubt take it less so if he were only what is called a 'fellow-traveler'; but, since the basis for the reproach ordinarily lies in some supposed threat to our institutions, those who fear that threat are not likely to believe that it is limited to party members. Indeed, it is not uncommon for them to feel less concern at avowed propaganda than at what they regard as the insidious spread of the dreaded doctrines by those who only dally and coquette with them, and have not the courage openly to proclaim themselves" (R. 20).

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 [28 U. S. C. A. § 347(a)]. The order of the Circuit Court of Appeals, reversing the judgment of the District Court, was filed November 2, 1945 (R. 21); and the order of the Circuit Court, denying a petition for a rehearing, was filed November 21, 1945 (R. 26).

Questions Presented

The primary question presented by the case at bar is whether or not it is an actionable libel, under the decisional law of the State of New York, for a member of a labor union to write in an article entitled "I Object To My Union In Politics", published in September, 1944, in a magazine of general circulation throughout the United States of America, that a named person, also described as the legislative agent of the Political Action Committee, was formerly a "legislative representative for the Massachusetts Communist Party". This question, with the case in its present posture, necessarily calls for a determination, as a matter of law, whether the alleged libelous words, fairly and reasonably construed, are susceptible of a de-

famatory imputation and, if so, whether such imputation is actionable under the law of New York without allegation and proof of special damage.

If the primary question herein is determined in the petitioner's favor, a further question, posed by the counsel for the respondent in his brief in the Circuit Court of Appeals and left open by the Circuit Court of Appeals in its opinion of reversal, may arise, viz., whether the complaint herein is legally sufficient if the alleged libelous words are or may be regarded as actionable *per se* anywhere in the United States.

Reasons Relied on for Allowance of the Writ.

1. The Circuit Court of Appeals has decided an important question of local law in a way to be deemed in conflict with applicable local decisions. It is settled law in New York that alleged libelous words, to be actionable *per se*, must appreciably affect reputation and, considered and weighed "in the minds of right-thinking persons", or "in the minds of ordinary, just and reasonable citizens", must be such as would tend to expose a person to public hatred, contempt and ridicule, or to induce an evil opinion of one in the minds of "right-thinking" persons and deprive him of their confidence and friendly intercourse in society. It is also the well-established rule in New York that an innuendo pleaded in a complaint cannot change or enlarge the plain meaning of words, and that it is not enough that the language complained of tends to injure the plaintiff in his office, profession or trade, but it must be proven to have been spoken or written in relation thereto. Furthermore, with proper regard for Constitutional guarantees of freedom of speech and of the press, the New York Courts have uniformly recognized the legal right of any person, whether newspaper, magazine, or private individual, to criticize and comment freely upon persons engaged in political activities

and other matters of public concern, at least where no attack is made upon their personal character in their private capacity. The Circuit Court of Appeals, as its opinion of reversal shows, failed to decide the instant case in accordance with these fundamental principles of the New York law of libel; and the decision below, if permitted to stand, would set an objectionable and confusing precedent wholly at variance with numerous decisions of New York Courts in cognate cases.

2. The Circuit Court of Appeals, in deciding an important question of local law, has failed to comply with the pronouncements of this Court relative to the ascertainment and application of state law in diversity cases. While purporting to follow the rule of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, as amplified by subsequent decisions of this Court, the Circuit Court of Appeals in fact made no fair, adequate or accurate appraisal and analysis of the New York cases bearing on the primary question presented by the case at bar. The Court not only disregarded authoritative New York decisions in point, including the authorities relied upon by the District Court; it deliberately refused to recognize and apply the well-settled New York rule, hereinabove averted to, that an alleged libel on a man in the way of his business, trade or profession is not actionable *per se* unless proven to have been written in relation thereto; and the Court went out of its way to cite and discuss a number of New York cases having little or no relation to the question at hand. With all due deference, the Circuit Court of Appeals did not perform its proper function and duty of ascertaining and applying state law as defined and applied by the courts of appellate and original jurisdiction in the State of New York, but decided the instant question in the light of its own preconceived notions as to what the New York law of libel ought to be.

3. The decision below has the effect of circumscribing the rights of freedom of speech and freedom of the press

and unduly restricts free discussion of political matters of vital public concern. If the actionability of words, alleged to be defamatory, is to be tested by the reaction of "wrong-thinking" persons, Constitutional freedom of speech and freedom of the press become, for all practical purposes, uncertain and illusory guarantees. Moreover, if such a test is to be applied in respect of published matter of a controversial or political nature, it is obvious that the exercise of these fundamental rights and liberties is substantially abridged, for no self-respecting publisher, regardless of the size of his pocketbook, could regularly undertake to publish what, in his opinion, should properly be published in the public interest, at the risk of being hailed into Court to answer and justify not only the truth of his printed words, but any imputation which a Court or jury thinks "wrong-thinking" persons thought or may have thought on reading the alleged libel. To hold the matter complained of herein actionable without allegation and proof of special damage, is clearly to impair and diminish "the effective exercise of rights so necessary to the maintenance of democratic institutions" (*Thornhill* v. *Alabama*, 310 U. S. 88, 96).

4. A review by this Court of the Circuit Court of Appeals' order of reversal herein is especially desirable in view of the Circuit Court of Appeals' decision in *Sweeney* v. *Schenectady Union Publishing Company*, 122 F. (2d) 288, and this Court's decision *per curiam* in that case, affirming the Circuit Court of Appeals' decision by an equally-divided vote (316 U. S. 642; rehearing denied, 316 U. S. 710). In the *Sweeney* case, as this Court may recall, the plaintiff, an Ohio Congressman, brought a libel action against a New York newspaper publisher, claiming that an article in the defendant's newspaper falsely accused the plaintiff of opposing the appointment of one Freed to the Federal bench in Ohio because Freed was a Jew and of foreign birth. There, as here, the Circuit Court of Appeals, purporting to ascertain and apply the law of New York, reversed a District Court order granting the defendant's

motion to dismiss the complaint for legal insufficiency, and held that the alleged libelous article was susceptible of a charge of anti-Semitism and that such charge was actionable *per se*. In so holding, however, and contrary to its decision in the case at bar, the Circuit Court of Appeals recognized and applied the well-established New York rule above-adverted to, and refused to consider "any libel upon the plaintiff as a lawyer since no reference was made in the publication to that profession of his" (122 F. (2d) 288, 290). Likewise, the Circuit Court of Appeals recognized and purported to base its decision in the *Sweeney* case squarely upon the New York Court of Appeals' decision in *Kimmerle* v. *New York Evening Journal, Inc.*, 262 N. Y. 99, which decision the Circuit Court of Appeals refused to follow in the case at bar. As Circuit Judge Chase, writing for the majority in the *Sweeney* case, stated: "The test is whether right-thinking persons would be reasonably expected to be induced by the publication to believe that it truthfully represented the plaintiff's attitude on the subject of Freed's appointment and would be likely to regard him as a consequence in such a way that his reputation was injured in one or more of the respects above noted" (122 F. (2d), 288, 290). Only in respect of its refusal to give effect to the New York decisions recognizing the right of any citizen to criticize and comment freely upon political matters and other matters of public concern, was the opinion of the majority of the Circuit Court of Appeals in the *Sweeney* case consistent with the Court's opinion of reversal herein; and although this Court granted certiorari on the defendant publisher's application in the *Sweeney* case (314 U. S. 605), presumably because of the "special and important" reasons therefor, the tie vote in this Court unfortunately permitted the Circuit Court of Appeals' decision of reversal to stand. It is, therefore, a matter of considerable present importance, not only to your petitioner, but to all New York publishers of newspapers, magazines and other publications, that a writ of certiorari be allowed in this case in order that the "accident of diversity of

citizenship" shall not again "disturb equal administration of justice in co-ordinate state and federal courts sitting side by side" (*Klaxon Co.* v. *Stentor Co.*, 313 U. S. 489, 496).

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and of all proceedings in the case numbered on its Docket No. 19875, and entitled as above shown; and that the Order of that Court filed November 2, 1945, be reversed; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and proper.

Dated: New York, N.Y.
December 31, 1945.

ROBERT E. COULSON,
Counsel for Petitioner.